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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1924

No. 126

In the Matter of GEO. W. COWEN CO., INC.,
Bankrupt.

A. L. MAY, as Trustee in Bankruptcy of Geo. W. Cowen Co., Inc. (a corporation), Bankrupt,
Petitioner,

vs.

J. M. HENDERSON, JR., and T. J. SCANNELL,
Respondents.

BRIEF FOR RESPONDENTS.

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Of Counsel.

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Respondents.

BRIEF FOR RESPONDENTS.

1. The bankrupt was indebted to the Fort Sutter National Bank of Sacramento in the sum of $15,000 evidenced by the note of the bankrupt. The moneys in question here were deposited in that bank. The bank offset or applied the moneys so deposited to

the note. Henderson was then the president of the bank and in its general control. He was also president in general control of the Sacramento-San Joaquin Bank, which afterward absorbed the Fort Sutter Bank. The banks—not Henderson or Scannell—were and ever since the appropriation of the money by the Fort Sutter Bank to the payment of the bankrupt's note, have been in possession of said money. This the evidence showed without dispute or question.

(Tr. beginning second line from bottom of pp. 115 to 118, also pp. 138-139.)

Also see opinion of the Circuit Court of Appeals. (Tr. p. 220 et seq.)

Henderson was president of the bank at the time the deposits were made and at the time the moneys were offset or applied on the note. This was done at Henderson's direction.

It is not claimed that Henderson was the sole owner of the bank, or that it was his alter ego, or agent or representative.

It follows that no matter whether the acts of Henderson or the bank were or were not legal Henderson has not the money and he and Scannel or either of them, cannot in a summary proceeding be compelled to restore that which they do not have or control to the trustee in bankruptcy.

This principle of law has been sustained by numerous cases in the federal courts.

It is clearly stated by Mr. Justice Gray of the Supreme Court of the United States, sitting in the Circuit Court of Appeals, Third Circuit, in the case of *American Trust Company of Pittsburg v. Wallis*, 126 Fed. 464. In that case the bankrupt collected and used moneys after having knowledge that a petition in bankruptcy had been filed against him. The opinion of the court in part stating as follows:

> "If the bankrupt denies that he has possession or control of the property, or, if a third person in possession thereof, claims to hold it, not as the agent or representative of the bankrupt, but by title adverse to him, and there is no evidence to indisputably show that such denial or claim is false or fraudulent, and that the case is one of simple concealment or refusal on the part of the bankrupt, or the one in possession, to deliver up the property as ordered, it would be an unwarranted stretch of power on the part of the court to resort to a summary proceeding for contempt for the enforcement of its order. In the absence of fraud or concealment, the bankrupt court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control. * * *
>
> The bankruptcy court is clothed with power, when the circumstances appear to warrant such proceedings, to have the bankrupt's property seized by the marshal or a special master immediately on the filing of the petition in bankruptcy. This power is a summary one, and can be exercised upon ex parte suggestion and was intended to meet the inconvenience suggested by appellant, of allowing the property of the bankrupt to remain in his possession and con-

trol and liable to be unlawfully made away with or concealed in the interval between the filing of the petition and the appointment of a trustee. A provision of this kind cannot always perfectly protect the creditors in their right to have the whole estate of the bankrupt segregated and guarded for their benefit. It does so as nearly as it can with due regard to fundamental principles and policies. It is better to fall short of an absolutely perfect administration of the theory of the bankrupt law, than to arm referee or court with powers of oppressions alien to the spirit of our laws and institutions."

As further support of this principle we quote from the syllabi of numerous cases as follows:

In re La Plume Condensed Milk Co., 145 Fed. 1013.

"The treasurer of a bankrupt corporation cannot be required by a summary order to turn over to the trustee money which he in fact paid out in settlement of debts of the corporation between the filing of the petition and the adjudication, even though such payments were not justified and resulted in preferences to the creditors receiving the same."

In re Berman, 165 Fed. 383.

"Evidence held insufficient to warrant a summary order requiring a bankrupt to pay over money to his trustee under the rule that such an order should not be made unless the bankrupt's ability to comply therewith is plainly and affirmatively shown."

In re Sax, 141 Fed. 223.

"A bankrupt should not be summarily ordered to pay over money or deliver property to

his trustee, unless the court is morally certain that he has been guilty of fraudulent concealment and that obedience to the order can be enforced. That he has failed to account satisfactorily for goods which went into his business is not sufficient to warrant such an order, where he denies the concealment of any money or property belonging to the estate, and the fact of concealment has not been made to appear by convincing evidence."

In re Smith, Longbottom & Sons, 142 Fed. 291.

"The fact that bankrupts improperly paid out money after the filing of the petition in bankruptcy, or otherwise expended it in good faith, is not ground for an order requiring them to pay it over to the trustee, where it is no longer in their possession or under their control."

In re Goldfarb Bros., 131 Fed. Rept. 643.

"To justify an order requiring a bankrupt to turn over money or property to his trustee under penalty of imprisonment for contempt, it must be shown clearly, satisfactorily and beyond a reasonable doubt, that he has such money or property in his possession or under his control. Where the evidence establishes only a strong probability that he has some money or property, which has not been accounted for, without furnishing any basis for a finding as to the amount, it is insufficient."

Epstein v. Steinfeld, 210 Fed. 236.

"An order, requiring a bankrupt to deliver property alleged to have been withheld from his trustee, should only be granted in case it appears that the bankrupt is physically able to deliver the property."

Stuart v. Renolds, 204 Fed. 709.

"A court of bankruptcy is without authority to make an order adjudging a bankrupt guilty of contempt for failure to obey an order of a referee requiring him to turn over property or money of the estate to his trustee, except on clear and convincing proof that he has present possession or control of the property or money and the ability to comply with the order."

In re Michie, 116 Fed. 749.

"BANKRUPTCY—JURISDICTION—ADVERSE CLAIM.

1. A court of bankruptcy has no jurisdiction over a controversy between the trustee and one to whom the bankrupt conveyed property, as to such property, where such person has possession, and makes a real, though fraudulent and voidable, adverse claim, and does not consent to the jurisdiction.

2. Petition of trustee in bankruptcy setting up a transfer to respondent by the bankrupt by way of preference and fraudulent conveyance shows a real adverse claim, excluding evidence that it was colorable."

In re Marks, 176 Fed. 1018.

"A bankrupt should not be committed for contempt for failure to comply with an order requiring him to turn over money to his trustee alleged to have been withheld where the court is convinced that the bankrupt is without physical ability to comply."

In re Nisenson, 182 Fed. 912.

"To sustain a referee's order requiring a bankrupt to surrender property alleged to have been withheld, it must be shown that the title to the property is in the trustee, and the possession and control thereof is in the bankrupt or in one who holds for him, or in his right."

In re Stern, 215 Fed. 979.

"In proceedings against a bankrupt to compel him to turn over assets alleged to have been withheld from his trustee, it is the duty of the court first to ascertain whether the property was in the bankrupt's possession or control at the time of the bankruptcy, and then whether the property is still in his possession and he is physically able to deliver it to the trustee."

Kirsner v. Taliaferro, et al., 202 Fed. 51.

"An order of a court of bankruptcy requiring a bankrupt to turn over property to his trustee, and committing him until he does so, made in a direct summary proceeding by the trustee, is reviewable only by petition to revise under Bankr. Act, July 1, 1898, c. 541, Sec. 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

To justify an order requiring a bankrupt to turn over property to his trustee, to be enforced by imprisonment for contempt until it is complied with, the evidence should establish the fact of his present ability to comply with the order beyond a reasonable doubt."

In

Shea et al. v. Lewis et al., 206 Fed. 877,

the court said:

"The bankruptcy court, however, has jurisdiction under an order to show cause to investigate and determine whether or not it had at the time the petition for the order to show cause was filed, or at any other time, actual possession of the property involved in the order and whether those asserting liens or title, have a substantial or only a frivolous and baseless adverse claim. Citing in re Ratham, 183 Fed. 913; Mueller v. Nugent, 184 U. S. 1; 46 L. ed.

405; Bryan v. Bernheimer, 181 U. S. 188; 45 L. ed. 14; Louisville Trust Co. v. Cominger, 184 U. S. 18; 46 L. ed. 413. If it had no such possession and if the claim asserted is actual and substantial as distinguished from one merely colorable and fictitious it may proceed no further but should decline to adjudicate on the merits without consent. If it errs in its ruling either way its action is subject to review. Mueller v. Nugent, 184 U. S. 1; 46 L. ed. 405. Such a claim may be adverse and substantial even though in fact fraudulent and voidable. Citing Johnston v. Spencer, 195 Fed. 215. Cooney v. Collins, 176 Fed. 189; In re Michie, Fed. 749."

In

First National Bank v. Chicago Title & Trust Co., 49 L. ed. 1051; 198 U. S. 280,

the court said:

"The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of estates of bankrupts, is recognized in sections 23, 24 and 25 of the present act, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction. (Citing authorities.) This distinction existed under the prior bankruptcy law and the then decision in respect of a proceeding in bankruptcy and an independent suit are applicable. It was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property not in the possession of the assignee in bankruptcy by summary proceedings, whether absolute title or only a lien was asserted."

The facts of this case illustrate the impropriety of the order made by the referee and we apprehend

that there is no impropriety in our going outside the record to state that Henderson is no longer the president of either of the banks, nor is he an executive officer thereof nor has he any control over them or either thereof. He surely could not be imprisoned for contempt for not forcing the banks to pay the money to the trustee in bankruptcy if he has not, as in fact he has not, the power so to do.

2. Conceding for the purposes of argument only that Henderson did cause the money to be deposited in the Fort Sutter National Bank and also conceding for the purpose of the argument only that Henderson was at the time an assignee or trustee of the bankrupt's estate, and also conceding that Henderson caused the money so deposited to be applied to the note of the bankrupt held by the bank the result was, if anything illegal, an illegal preference of the bank and jurisdiction to try that question can be only in a plenary action.

Louisville Trust Co. v. Comingor, 184 U. S. 18; 46 L. ed. 413;

Bardes v. First National Bank, 178 U. S. 524; 44 L. ed. 1175;

Cooney v. Collins, 176 Fed. 189;

In re Middleton Contracting Co., 243 Fed. 56;

In re Noel, 137 Fed. 694;

In re Mitchie, 116 Fed. 749;

In re New York Car Wheel Works, 132 Fed. 203;

In re Knickerbocker, 121 Fed. 1004.

Henderson and Scannel denied that they acted as trustees or assignees of the bankrupt. Henderson denied he caused the deposits to be made in the bank in his and Scannell's names as trustees or otherwise. These issues the bank has a right to have tried in a plenary action.

The bank was not a party to the proceedings against the respondents.

Much is made in petitioner's brief of the fact that Henderson caused to be removed the pages of the loose sheet ledger showing the account in the names of Henderson and Scannel as trustees. If Henderson did not authorize deposits so to be made in his name jointly with that of Scannel, as trustees, he had a right to have the record corrected. No concealment of the fact was made by Henderson. His attorney volunteered the information at the hearing that the removal of the sheets was made on Henderson's orders.

It is respectfully submitted that the petition should be denied.

Dated, San Francisco,
October 11, 1924.

A. A. DeLigne,
Attorney for Respondents.

Archibald M. Johnson,
Of Counsel.